UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 98A00058
TEMPO PLASTIC CO., INC., Respondent	)	Judge Robert L. Barton, Jr.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

(October 14, 1998)

I. INTRODUCTION

Complainant has filed a motion for summary decision pursuant to 28 C.F.R. § 68.38. This case centers around Complainant's allegations that Respondent violated the Immigration and Nationality Act (INA) by continuing to hire an employee knowing he was unauthorized to work in the United States. Specifically, Complainant does not assert that Respondent knew the employee, Rene F. Perez, was unauthorized when it hired him in 1991, but it does contend that Respondent continued to employ him from May 5, 1994, to May 25, 1995, knowing that he was unauthorized to work in this country. The main issues in this Order are:

(1) whether Complainant has demonstrated that there are no genuine issues of material fact in this case; and

(2) whether Complainant has demonstrated that it is entitled to judgment as a matter of law against Respondent.

This Order disposes of all outstanding motions. For the reasons discussed in detail below, I find that Complainant has demonstrated that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. As a result, I

(1) GRANT Complainant's Motion for Summary Judgment; and
(2) DENY Respondent's Motion to Dismiss.

Consequently, Complainant's Motion to Strike Affirmative Defenses is moot.

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II. PROCEDURAL HISTORY

In a Complaint served on Respondent March 24, 1998, Complainant alleges that the Respondent continued to employ an alien, Rene F. Perez, knowing that he was or had become unauthorized, a violation of § 274A(a)(2) of the INA, 8 U.S.C. § 1324a(a)(2). Complainant demands a civil monetary penalty of $1,000 for this violation. In addition to the filed Complaint, Complainant also served Respondent with a Request for Admissions of Fact and Authenticity of Documents on March 25, 1998. Respondent failed to file an answer within the required 30 day period and thus, on May 12, 1998, Complainant filed a Motion for Default Judgment for Failure to Answer the Complaint. On May 12, 1998, I issued an Order Noting Default and instructed Respondent to file a request for leave of court to file a late answer and an answer on or before June 1, 1998.

On June 1, 1998, Respondent's president filed a letter with the Court. Some of the Respondent's statements in this letter did not appear to respond to the allegations of the Complaint. On June 5, 1998, I issued a Notice of Telephone Prehearing Conference for June 18, 1998, to discuss the status of the case with an emphasis on the pleadings and Complainant's Motion for Default Judgment. During the June 18, 1998, prehearing conference it became clear that Respondent's June 1, 1998, letter was not an answer to the Complaint, but an answer to Complainant's March 25, 1998, requests for admissions. Based on the March 25, 1998, date of Complainant's requests for admissions, it appeared that Respondent's response was late. I noted that failure to timely respond to requests for admissions results in the automatic admission of those items.

During the prehearing conference, I allowed Respondent until June 29, 1998, to 1) file a motion to withdraw matters deemed admitted for its failure to timely answer the request for admissions of fact and request for admissions of authenticity of documents, 2) file a late answer to the Complaint, and 3) file substitute answers to the request for admissions. PHCR at 2. On June 29, 1998, Respondent requested a five-day extension for filing its answer. Complainant did not object to this request, and I granted the five day extension. On July 6, 1998, Respondent did file its answer and its Motion to Withdraw Matters Deemed Admitted. I then issued an order on August 11, 1998, permitting Respondent to substitute its July 6, 1998, admissions of fact and admissions authenticating documents for its June 1, 1998, admissions. Thus, the admissions referenced in this opinion are the amended version served on July 6, 1998.

On August 24, 1998, I received Complainant's Motion to Strike Affirmative Defenses and Motion for Summary Decision. Complainant's Motion is supported by its Request for Admissions of Fact; the alien's ETA 750; the alien's I-9 Employment Eligibility Verification Form and photocopies of his fraudulent alien registration card; the Border Patrol's Rationale for the Recommendation to Fine Respondent; Special Border Patrol Agent Borup's Affidavit; the Border Patrol's Memorandum of Investigation; its Notice of Inspection; and an INS Central Index printout establishing that the alien's registration card was in fact registered to someone else. Respondent

replied by filing a Motion to Dismiss the Complaint and a Response to Complainant's Motion to Strike Affirmative Defenses and Motion for Summary Decision.

III. STANDARDS FOR SUMMARY DECISION

The OCAHO Rules authorize an Administrative Law Judge (ALJ) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1997). This OCAHO Rule is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before federal district courts. Thus, although OCAHO does have its own procedural rules for cases arising under its jurisdiction, the ALJs may reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rule governing OCAHO proceedings. As such, Rule 56(c) and federal case law interpreting it are useful in determining whether summary decision is appropriate under the OCAHO Rules. See United States v. Aid Maintenance Co., 6 OCAHO 810 , 813 (Ref. No. 893) (1996), 1996 WL 735954, at *3, (citing MacKentire v. Ricoh Corp., 5 OCAHO 191, 193 (Ref. No. 746) (1995), 1995 WL 367112, at *2, and Alvarez v. Interstate Highway Constr., 3 OCAHO 399, 405 (Ref. No. 430) (1992), 1992 WL 535567, at *5; United States v. Tri Component Product Corp., 5 OCAHO 765, 767 (Ref. No. 821) (1995), 1995 WL 813122, at *3 (citing same).

As stated above, in deciding whether to grant a summary decision, I must decide if there are genuine issues of material fact in question. For this purpose, a fact is material if it might affect the outcome of the case. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Additionally, an issue of material fact must have a "real basis in the record" to be genuine. Tri Component, 5 OCAHO 765, 768 (1995) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In determining whether that burden has been met, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. See Matsushita, 475 U.S. at 587 (1986). Additionally, the moving party has the burden of showing that it is entitled to a judgment as a matter of law. See United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991), 1991 WL 717207, at * 1-2 (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). More specifically, the moving party is entitled to summary judgment "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita, 475 U.S. at 587 (1986).

After the moving party has met its initial burden, the burden then shifts to the non-moving party to set forth "specific facts showing that there is a genuine issue for trial." Tri Component, 5 OCAHO 765, 768 (1995) (quoting Fed. R. Civ. P. 56 (e)). Thus, when a motion for summary decision is supported and the moving party has met its initial burden, the non-moving party cannot

rely on denials contained within the pleadings in opposing the motion. 8 C.F.R. § 28.68(b) specifically provides the following:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such a pleading. Such a response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

8 C.F.R. § 28.68(b)(1997). If the non-moving party fails to provide such specific facts, summary decision, if appropriate, shall be granted against the non-moving party. See 8 C.F.R. § 28.68(b) (1997); Fed. R. Civ. P. 56(e).

IV. FINDINGS

Respondent hired Rene F. Perez on or about March 19, 1991. See R's Adm. ¶ 3. On May 5, 1994, Douglas Rogers, Respondent's president, signed a United States Department of Labor, Employment and Training Administration Application for Alien Employment Certification (DOL Form ETA 750) for Mr. Perez. See C's Exh. 2. On its face, the ETA 750 suggested that Perez did not have a visa at the time of the form's completion and submission. Because the ETA 750 asserted such facts, the Department of Labor forwarded the document to Special Border Patrol Agent Borup for further investigation. See Borup Aff. at 2.

After receiving a copy of the ETA 750 application, Agent Borup then sent a Notice of Inspection to Respondent in order to conduct an I-9 Form investigation. While conducting such an investigation on May 25, 1995, Agent Borup discovered that Rene F. Perez submitted a fraudulent alien registration card to fulfill the I-9 Form requirements and that he was unauthorized to work in the United States. See C's Exh. 1. Agent Borup discussed Mr. Perez's status with Mr. Rogers on the day of the inspection. Borup Aff. 3-4. Respondent then dismissed Mr. Perez within the three day deadline given to him by Agent Borup. See Ans. at 3.

On October 13, 1995, the Border Patrol issued a Notice of Intent to Fine upon Respondent. After Respondent timely requested a hearing on the matter with the Office of the Chief Administrative Hearing Officer (OCAHO), Complainant filed a complaint with OCAHO, which was served on Respondent March 24, 1998.

In this Complaint, Complainant alleges that Respondent continued to employ an alien, Rene F. Perez, in the United States, after November 6, 1986, knowing that he was not authorized for such employment. Respondent admits that it hired Rene F. Perez on or about March 19, 1991, and that the alien was then present in the United States. See R's Adm. ¶ 3. Further, the record establishes that Rene F. Perez presented a fraudulent alien registration card to fulfill I-9 requirements and thus was, at the time of commencing employment, unauthorized to work in the United States. See C's Exh. 1. These elements being established, the only remaining issue to be resolved is whether Respondent had "knowledge" of the alien's unauthorized status. Complainant does not allege that

Respondent knew Perez was unauthorized when it initially hired him, but rather that it later learned of his unauthorized status and continued to employ him in violation of 8 U.S.C. § 1324a(a)(2). Complainant contends that Respondent should be held liable under theories of both actual and constructive knowledge of such unauthorized status. See C's Mt. for Sum. Dec. at 13-14.

A. Actual knowledge

In an affidavit supporting Complainant's Motion for Summary Decision, Agent Borup asserts that Mr. Rogers made certain statements on the day of the I-9 investigation that establish he had actual knowledge of Perez's unauthorized status. Specifically, Borup states that after pointing out to Mr. Rogers that the ETA 750 Form is an "Alien Employment Certification," Mr. Rogers admitted that he was trying to help Perez legalize his immigration status and that he had tried to "do things by the book." Borup Aff. at 4. Agent Borup also states that Mr. Rogers commented about Perez's critical skills for the operation of certain manufacturing equipment in the plant and stated that "Tempo Plastic Company, Inc., could not continue production without Perez." Borup Aff. at 4-5.

In a case factually similar to this one, the ALJ found knowledge, in part, based upon similar statements made by an employer. "Bell [the employer] knew Alvarez [the employee] originated from Mexico and believed he was in the process of being legalized. It follows that Bell knew he was not yet legal. Respondent's motivation was 'to get [Alvarez] legalized.'" United States v. American McNair, 1 OCAHO 1846, 1854-55 (Ref. No. 285) (1991), 1991 WL 531946, at *7-8 (1992). In the same manner, if Mr. Rogers admitted trying to help legalize Perez's immigration status, it is logical to infer that he knew Perez was unauthorized at the time he signed the ETA 750.

The statements made by Mr. Rogers to Agent Borup on the day of the I-9 investigation may be given consideration when ruling on this Motion for Summary Decision. They are non-hearsay, and Respondent's president has not denied making them. The term "hearsay" includes statements, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). While the statements made by Mr. Rogers would seemingly fall into this definition, they are specifically excluded from such categorization because they are admissions by a party opponent. Federal Rule of Evidence 801 treats admissions by party opponents as non-hearsay. "A statement is not hearsay if ... [t]he statement is offered against the party and is (A) the party's own statement, in either an individual or a representative capacity, ..." Fed. R. Evid. 801(d)(2). Mr. Rogers, as president of Tempo Plastic Co., Inc., is a party opponent and his statements are being offered against him in this proceeding. Therefore, the statements are non-hearsay.

In any event, OCAHO Rules of Practice allow the admission of hearsay. 28 C.F.R. § 68.40 provides that "[a]ll relevant material and reliable evidence is admissible, but may be excluded." In fact, "[i]t is well established ... that hearsay evidence is admissible in administrative proceedings, if factors are present which assure the underlying reliability and probative value of the evidence." United States v. China Wok Restaurant, Inc., 4 OCAHO 178, 189 (Ref. No. 608) (1994), 1994 WL 269371, at *8 (Decision and Order Granting in Part Complainant's Motion for Partial Summary Decision, Staying a Ruling on Count III, Directing Respondent to File Additional Evidence and

Setting Date for an Evidentiary Hearing). Thus, the statements would be admissible even if they were considered hearsay.

Furthermore, Respondent does not specifically deny that its president made such statements to Special Agent Borup on May 25, 1995. In its March 25, 1998, Request for Admissions, Complainant propounded the following statement: "[a]dmit or deny that on May 23, 1995 Respondent's owner Douglas Rogers informed US Border Patrol Agent Steven Borup that Respondent was trying to help Rene F. Perez legalize Perez' immigration status in the United States by filing an Application for Alien Employment Labor Certification on behalf of Perez." C's Req. For Adm. at 2, ¶ 8. In its July 6, 1998, amended admissions, Respondent's president, on the first page, denies the allegations in the above paragraph. See R's Adm. ¶ 1. However, when specifically responding to such request later in the answer, Respondent's president states the following:

> Agent Borup quotes me after he had dismantled my companys' productive capacity. I was upset at the problems now facing me in making debt and tax payments without employees who had received a lot of training and job skills.
>
> My understanding of Rene Perez' eligibility was that his Alien Registration Receipt Card allowed him to live and work in the United States on a temporary basis and that the Resident Alien card allowed permanent residence. The purpose of filing the Application for Alien Employment Labor Certification was to effect the transition from temporary to permanent status.

R's Adm. ¶ 8 (emphasis added). Additionally, in its answer, Respondent's president states that "Agent Borup gave me no indication that anything I said to him would be used against me in a legal proceeding." Ans. at 3. According to Respondent's answer and its admissions, it does not deny that Mr. Rogers told Agent Borup that he was trying to help Perez gain legal status. Thus, Mr. Rogers had actual knowledge of Mr. Perez's unauthorized status and because Mr. Rogers is the president of Respondent, that knowledge is imputed to Respondent.

Moreover, Respondent does not offer specific facts, such as counter affidavits, to deny that the statements were made. Federal Rule of Civil Procedure 56(e) states the following:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. Proc. 56(e). The advisory committee's note to F.R.C.P. 56 provides a helpful background as to why the above two sentences were added to subsection (e). Prior to the addition of these sentences, the Third Circuit engaged in a practice that led to a significant number of

summary judgments being denied. Essentially, a party would support its motion for summary judgment with affidavits and other evidentiary matters sufficient to show an absence of a genuine issue of material fact. The adverse party would then not produce any evidentiary matter, or would produce some, but not enough, to establish a genuine issue of material fact. Regardless, the Third Circuit would deny summary judgment based upon the adverse party's reliance on denials in its pleadings. Fed. R. Civ. Proc. 56(e) advisory committee's note. The advisory committee added the last two sentences of subsection (e) to overcome this practice. It states, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Id.

The factual scenario in this case is similar to what occurred in the Third Circuit before the addition of the last two sentences of Federal Rule of Civil Procedure 56(e). Complainant has established that Respondent had actual knowledge of the alien's unauthorized status by providing affidavits and other evidentiary matters. Respondent has not produced evidentiary matter that establishes that there is a genuine issue for trial. As Rule 56(e) provides, "[m]ere conclusory rebuttals by the nonmoving party will not defeat a motion for summary judgment." Brouillette v. United States Department of Agriculture, 840 F. Supp. 55 (1993). Thus, the fact that Respondent has not provided evidentiary matter establishing a genuine issue of material fact provides an additional reason for granting Complainant's Motion for Summary Decision.

B. Constructive Knowledge

Although I have found that Respondent had actual knowledge of Perez's ineligible status, I note that Complainant also alleges that Respondent had constructive knowledge of Perez's unauthorized status. OCAHO regulations and prior case law establish that the term "knowing" includes constructive, as well as, actual knowledge.

> The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:
>
> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9.
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
>
> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

8 C.F.R. § 274a(1)(1)(1997).

A majority of recent OCAHO cases finding liability on a constructive knowledge basis involve an employer receiving information from the INS warning it that certain employees may not be authorized, and the employers then failing to take the necessary steps to reverify or investigate

the eligibility of these employees. See United States v. 4431, Inc., 4 OCAHO 212 (Ref. No. 611) (1994), 1994 WL 269390; United States v. Noel Plastering & Stucco, Inc., 3 OCAHO 296 (Ref. No. 427) (1992), 1992 WL 533132, aff'd, Noel Plastering & Stucco, Inc. v. OCAHO, 15 F.3d 108 (9th Cir. 1993) (unpublished; text available at 1993 WL 533526); United States v. New El Rey Sausage Co., 1 OCAHO 389 (Ref. No. 66) (1989), 1989 WL 433842; 433854, aff'd, New El Ray Sausage v. INS, 925 F.2d 1153 (9th Cir. 1991); United States v. Mester Mfg. Co., 1 OCAHO 53 (Ref. No. 18) (1988), 1988 WL 507634, adopted by CAHO, (July 12, 1988), 1988 WL 409575, aff'd, Mester Mfg. Co. v. INS, 879 F.2d 561 (9th Cir. 1989). The Ninth Circuit has warned that the doctrine of constructive knowledge should not be applied expansively for fear of upsetting the balance of IRCA's dual goals of "preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens." Collins Food Int'l, Inc. v. INS, 948 F.2d 549, 554-55 (9th Cir. 1991), rev'g United States v. Collins Food Int'l, Inc., 1 OCAHO 828 (Ref. No.123) (1990), 1990 WL 512062, aff'd by CAHO, 1 OCAHO 875 (Ref. No. 129) (1990), 1990 WL 512164.

In Collins, the ALJ found constructive knowledge based on the facts that an employee authorized to make hiring decisions offered a job over the telephone without having reviewed the prospective employee's documentation and that the hiring employee failed to compare the back of the new employee's social security card, which was a forgery, with the example in the INS Handbook for Employers. See id. at 551. The Ninth Circuit reversed this decision, contrasting the context in which constructive knowledge had been found in Mester and in New El Rey with the situation in Collins, stating that "Collins Foods did not have the kind of positive information that the INS had provided in *Mester* and *New El Rey Sausage* to support a finding of constructive knowledge." Id. at 555. The Court, however, did not state that constructive knowledge only could be found in these situations. See id.

In fact, I have found constructive knowledge in a situation factually different from that in Mester and New El Rey. In United States v. American Terrazzo Corp., 6 OCAHO 577 (Ref. No. 877) (1996), 1996 WL 914005, I found a knowing continue to employ violation based on constructive, if not actual, knowledge. I ruled that respondent knew or should have known that the alien was unauthorized due to the following factors:

> the employee's testimony that she never told anyone connected with the respondent that she was a U.S. citizen; that she told the person who hired her, the respondent's manager, that she was a foreign student from Budapest; that everyone knew she was a Hungarian citizen; and that she did not complete an I-9 form that contained her name and stated she was a citizen or national of the United States; the respondent completed the I-9 form bearing the employee's name, including section one, which the employee is supposed to complete; the

> respondent did not complete that I-9 form until after it had received a notice of inspection from the INS; and the employee's social security card stated that it was valid for work only with INS authorization.

United States v. Mark Carter, 7 OCAHO 931, at 18 (1997), 1997 WL 602725, at *13 (citing Terrazzo, 6 OCAHO 577, 588-89 (1996)).

Additionally, other ALJs have also found such knowledge in other settings. In United States v. American McNair, 1 OCAHO 1846 (Ref. No. 285) (1991), a case with facts similar to this one, an unauthorized alien presented an ETA 750 and an I-140 to his employer for signature. Like Rene Perez, the unauthorized alien in McNair had these documents prepared by a third-party. Also, as does Tempo, the employer in American McNair argued that an attorney had advised it that it was permitted to employ the alien during the labor certification process. See McNair, 1 OCAHO 1846, 1855 (1991). However, unlike this case, in McNair, the employer never requested that the employee present documents to establish his work authorization. Nevertheless, Judge Frosburg found that "regardless of Bell's [the employer] knowledge as to the specifics of these two forms [the ETA 750 and the I-140], he had sufficient information in his possession which gave him reason to know of Alvarez' unauthorized status. Much of that information was contained in those two forms." See id.

While ALJs found constructive knowledge in the above-mentioned cases, they did so in final orders and decisions, as opposed to summary decisions. Judges have been somewhat hesitant to base a summary judgment on a constructive knowledge theory due to the state of mind element required with a finding of such knowledge. "Case law cautions that state of mind is seldom amenable to summary disposition." United States v. Jonel, Inc., 7 OCAHO 967, at 8 (1997). (However, in Jonel, Inc., the central state of mind issue involved whether a former owner's knowledge could be imputed to the respondent.) In Terrazzo, I also denied Complainant's motion for summary decision in part because "summary decision generally is inapposite when there are issues concerning the state of mind of a party." Terrazzo, 6 OCAHO 60, 65 (1995).

However, I emphasized that "my ruling should not be read to mean that a motion for summary decision is never appropriate when state of mind is an issue." Terrazzo, 6 OCAHO 60, 65. Summary decision may be appropriate when the exhibits offered in support of the motion are sufficient to establish that Respondent either had actual or constructive knowledge of an alien's unauthorized status. See id. For example, in United States v. Haim, 7 OCAHO 988 (1998), the Complainant alleged that Respondent had knowledge at the time of hire that it was employing two unauthorized aliens because "1) the respondent did not comply with IRCA's Form I-9 employment verification requirements with respect to Garcia and Jacobo [the employees], and 2) Garcia and Jacobo had orally informed respondent that they were unauthorized for employment and in the United States unlawfully at the time of hire." Haim, 7 OCAHO 988, at 7. The ALJ found that, in part, because respondent failed to produce *any* evidence to rebut the Complainant's evidence or raise a genuine issue of material fact, granting summary judgment for the Complainant was

appropriate. Haim, 7 OCAHO 988, at 9. This case is similar to Haim, in that Complainant has provided sufficient evidence to establish that Respondent had knowledge of the alien's unauthorized status, and Respondent has not produced evidence to rebut that evidence.

Here, although Respondent denies it had "knowledge" of the alien's unauthorized status, it admits that Mr. Rogers signed the ETA 750 Form. In its Amended Responses to Complainant's Request for Admissions, Respondent states: "[t]he Labor Application was prepared by a 3rd party, supposedly knowledgeable in employment matters, not paid by me. I signed the application following instructions of this third party, who was retained by Rene Perez." R's Adm. at 1 (emphasis added). Respondent also acknowledges responsibility for his signature upon the form.

> I acknowledge responsibility for the form, but point out that the distractions of meeting payroll and taxes, bank payments and general business obligations prevented me from studying this matter closely, and even noting at the time I signed the form that the VISA requirement was fulfilled and that the box should have been checked.

R's Resp. to Mt. to Strike Affirm. Def. and Mt. for Sum. Dec. at 4.

Employers and employees complete and submit ETA 750 Forms in order for aliens, otherwise unauthorized to work in the United States, to obtain employment-related immigrant visas. 8 U.S.C. § 1153(b)(2) and (3), § 1182(a)(5)(A)(1997). The employer and the employee may designate agents to complete the form. However, when doing so, the employer and employee must "sign the statement on the application that the alien and/or employer takes full responsibility for the accuracy of representations made by the agent." United States v. Jonel, Inc., 8 OCAHO 1008, at 5 (1998) (citing 20 C.F.R. § 656.20(b)(1)(1997). Here, a third-party did complete the ETA 750, but pursuant to 20 C.F.R. § 656.20(b)(1), the employer, Tempo Plastic Co., Inc., is responsible for that third-party's representations.

By signing such a form, Respondent was, or should have been, on notice that the employee in question was unauthorized. The ETA 750 provides a space for designating the type of visa the alien holds. On the ETA 750 that Rene F. Perez submitted to Respondent that space contained the word "NONE." See C's Exh. 2. Also, in Part B of the ETA 750, the form asks for the type of visa held by the alien. In this space were the words "Not Applicable." See C's Exh. 2 at 3. Further, OCAHO regulations specifically list the labor certification application (ETA 750) as information that should alert the employer that the employee listed on such form may not be unauthorized. In fact, in determining that an employer had knowledge of an alien's unauthorized status, the ALJ in Jonel, Inc., found that respondent was aware that a labor certification did not confer work authorization because this was plainly stated in the labor certification papers. Jonel, Inc., 8 OCAHO 1008 (1997) (Final Order and Decision).

Unlike other cases where an alien wrongfully specifies that she holds a visitor visa, Perez did not make such assertion on the ETA 750 Form. The Form represents that Perez had NO visa. See

C's Exh. 2. Even if the Respondent thought the alien was authorized prior to signing the ETA 750, as of May 5, 1994, the date of the ETA, Mr. Rogers should have known that Rene F. Perez was unauthorized. At the least, he should have investigated the matter further. "The employer is liable not only for failing to "know" the status of the employee, but also for failing to take the steps necessary to learn the status of the employee." McNair, 1 OCAHO 1846, 1853.

C. Liability Established

As stated earlier, when considering a summary decision motion, the initial burden of production falls upon Complainant to show that there are no genuine issues of material fact in dispute and that the movant is entitled to judgment as a matter of law. Complainant has met this burden. Complainant has submitted the ETA 750 application with Mr. Rogers' signature which establishes that Respondent had constructive knowledge of the alien's unauthorized status. It also has submitted an affidavit by the Border Patrol Agent which references admissions made by Mr. Rogers, establishing that Mr. Rogers had actual knowledge that Rene F. Perez was not authorized to work in the United States. This evidence is sufficient for Complainant to meet its initial burden.

After Complainant has met this initial burden, Respondent then has the burden of establishing by "specific facts" that there are genuine issues of material fact in dispute. In opposing this summary judgment motion, Respondent relies on the denials contained within its pleadings. Since Complainant has established facts sufficient for granting a summary decision, combined with the fact that Respondent does not provide extrinsic evidence to refute Complainant's case, the granting of summary decision for Complainant is warranted. Specifically, I find that Complainant has proven its assertion that Respondent continued to employ Mr. Perez from May 5, 1994 until May 25, 1995, knowing that he was not authorized to work in this country, and therefore Respondent violated § 1324a(a)(2).

V. PENALTY

A. Applicability of Statutory Factors

With respect to penalty, Complainant has requested $1,000 and a cease and desist order. In requesting the $1,000 amount, Complainant suggests that the five statutorily mandated factors set out in § 274A(e)(5) that are used in setting a civil money penalty for paperwork violations should also be used in setting penalties for a continuing to employ violation. See C's Mt. for Sum. Dec. at 19. The wording of the § 274A(e)(5) penalty provision, the duplicative nature of the penalty factors when applied to knowing hire and continue to employ violations, the fact that the Chief Administrative Hearing Officer (CAHO) has not mandated usage of these factors in this realm, and the fact that there is not a consensus of such usage among ALJs, lead me to reject the usage of such factors in setting the fine for knowing to hire and continue to employ violations.

Section 274A(e)(5) provides the following:

> With respect to a violation of subsection (a)(1)(B) of this section, the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000.00 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an authorized alien, and the history of previous violations.

8 U.S.C. § 1324a(e)(5) (emphasis added). As illustrated above, this provision explicitly pertains to § 1324a(a)(1)(B) paperwork violations. It does not refer to subsection (a)(1)(A) knowing hire violations or subsection (a)(2) continue to employ violations. Statutory construction principles suggest that if the drafters of this provision meant it to pertain to subsections (a)(1)(A) and (a)(2), those subsections would also be specifically listed within the provision.

Moreover, applying the subsection (e)(5) factors to continue to employ violations would be duplicative because several of the (e)(5) factors are elements of subsection (a)(2) violations. Factors particularly duplicative are the seriousness of the violation, the good faith of the employer, and whether the alien was unauthorized. In order to find a continue to employ violation, subsection (a)(2) requires that the alien be unauthorized. Also, continuing to employ an unauthorized alien once an employer is aware of that person's unauthorized status is, on its face, a serious offense. United States v. Great Bend Packing Co., Inc., 6 OCAHO 129, 133 (Ref. No. 835) (1996), 1996 WL 207188, at *3. Further, continuing to employ an unauthorized alien is evidence of an employer's lack of good faith. The only (e)(5) factors not duplicative are the size of the business and the history of previous violations. These would be relevant in making a penalty determination, regardless of whether they were included within subsection (e)(5).

The CAHO has not mandated usage of the (e)(5) factors in knowing hire and continue to employ violations, and there is no consensus among ALJs on such usage. Some ALJs have referenced the factors. See United States v. Ulysses, Inc., 3 OCAHO 544 (Ref. No. 449) (1992), 1992 WL 535586; United States v. Park Sunset Hotel, 3 OCAHO 1273 (Ref. No. 525) (1993), 1993 WL 818363 modified by CAHO on other grounds, 3 OCAHO 1266 (Ref. No. 525) (1993), 1993 WL 403095. Others have considered other items in setting such penalties. See United States v. New Peking, Inc., 2 OCAHO 259 (Ref. No. 329) (1991), 1991 WL 531752 modified by CAHO on other grounds, 2 OCAHO 250 (Ref. No. 329) (1991), 1991 WL 531830. In determining the penalty amount in New Peking, the Judge considered such factors as the fact that the employer paid the employees in question in cash and did not withhold taxes. He also considered the fact that most of the employees were eligible for employment in the United States and the respondent's size in relation to penalties already assessed for paperwork violations as mitigating factors.

For the reasons established above, I find that section 1324a(e)(5) is not applicable to the knowing hire or continue to employ violations.

While I will not apply subsection (e)(5) itself in determining the penalty for this subsection (a)(2) continue to employ violation, several of the same factors listed therein are relevant here. Specifically, I note that continuing to employ an unauthorized alien is a serious offense. American Terrazzo, 6 OCAHO 577, 590 (1996); United States v. Great Bend Packing Co., Inc., 6 OCAHO 129, 133 (1996). Moreover, an employer acts in bad faith once it continues to employ an individual after learning that the employee is not authorized.

Here, Complainant seeks a penalty of $1,000 for the continuing to employ violation. The minimum penalty for a knowing violation is $250 and the maximum penalty is $2,000. In Great Bend Packing Co., supra, the Judge imposed a penalty of $1,200 for a knowingly continuing to employ violation. Id. at 138. Similarly, in Jonel, Inc., the Judge assessed a penalty of $1,200 for knowingly continuing to employ an alien. Thus, I find that the requested penalty of $1,000 is reasonable, especially given my finding that Respondent had actual knowledge of the alien's unauthorized status.

B. Ability to Pay the Proposed Penalty

Although inability to pay the penalty in an employer sanctions proceeding is not specifically mentioned in section 1324a, in past cases judges have considered a respondent's inability to pay a proposed penalty. See United States v. Raygoza, 5 OCAHO 48, 52 (Ref. No. 729) (1995), 1995 WL 265080, at *3; United States v. Giannini Landscaping, Inc., 3 OCAHO 1730, 1740 (Ref. No. 573) (1993), 1993 WL 566130, at *5; United States v. Minaco Fashions, Inc., 3 OCAHO 1900, 1909 (Ref. No. 587) (1993), 1993 WL 723360, at *7. However, inability to pay a penalty is an affirmative defense, and a respondent bears the burden of both raising the defense and proving the defense. See United States v. Dominguez, 8 OCAHO 1000 (1998); United States v. Mark Carter, 7 OCAHO 931, at 46 (1997). In this case, Respondent did allege in its Response to Complainant's Motion to Strike Affirmative Defenses and Motion for Summary Decision that it could not pay the proposed penalty. "Material fact is that Tempo Plastic is now and has been in difficult financial circumstances resulting from air quality compliance in January, 1992 and subsequent loss of customers. Tempo cannot pay the $1,000.00." R's Resp. to Mt. to Strike Affirm. Def. and Mt. for Sum. Dec. at 6. However, a bald assertion by Respondent as to its inability to pay is not sufficient to establish the defense.

The issue here is whether at this time Respondent is unable to pay the penalty proposed by Complainant and, if so, whether it can pay any penalty. See American Terrazzo, 6 OCAHO at 598. As noted above, it is Respondent's burden to establish such inability. Although Respondent asserts in its response to the motion for summary decision that it cannot pay the proposed $1,000 penalty, Respondent did not proffer any evidence or attach any documents to its response to support its assertion that it cannot pay the penalty proposed in the complaint. Further, the record itself does not show that Respondent cannot pay the proposed penalty. Therefore, I reject Respondent's assertion.

VI. CONCLUSION

For the reasons stated above,

1. Respondent's Motion to Dismiss is denied;

2. Complainant's Motion for Summary Decision is granted and a penalty of $1,000 is imposed; and

3. Complainant's Motion to Strike Affirmative Defenses is rendered moot.

In addition to paying a $1,000 civil money penalty, Respondent also is ordered to cease and desist from hiring or continuing to employ an alien in the United States knowing the alien is, or has become, an unauthorized alien with respect to such employment.

_____

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE REGARDING APPEAL

Pursuant to the Rules of Practice, 28 C.F.R. § 68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review, with supporting arguments, by mailing the same to the CAHO at the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2519, Falls Church, Virginia 22041. The request for review must be filed within 30 days of the date of the decision and order. The CAHO also may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become the final order of the Attorney General of the United States unless, within thirty days of the date of the decision and order, the CAHO modifies or vacates the decision and order. See 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a person or entity adversely affected by a final order issued by the Administrative Law Judge or the CAHO may, within 45 days after the date of the Attorney General's final agency decision and order, file a petition in the United States Court of Appeals for the appropriate circuit for the review of the final decision and order. A party's failure to request review by the CAHO shall not prevent a party from seeking judicial review in the appropriate circuit's Court of Appeals. See 8 U.S.C. § 1324a(e)(8).

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 1998, I have served the foregoing Order Denying Respondent's Motion to Dismiss and Granting Complainant's Motion for Summary Decision on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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_____

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